Schapiro Exhibit 173

Subject: FW: YouTube and the copyright cops: safe... for now?
From: "Fricklas, Michael" <EX:/O=VIACOM/OU=CORPUSA/CN=RECIPIENTS/CN=FRICKLAM>
To: Fricklas, Michael
Cc: Date: Tue, 18 Jul 2006 00:03:44 +0000

From: Jason Hirschhorn [mailto:jasonh@triplehmedia.com]
Sent: Monday, July 17, 2006 8:02 PM
To: Fricklas, Michael; Matthews, Beth; Lehman, Nicholas
Subject: Re: YouTube and the copyright cops: safe... for now?

I believe that more than 60% of youtube's traffic is from copyrighted material

On 7/17/06 7:59 PM, "Fricklas, Michael" <Michael.Fricklas@viacom.com> wrote:

thanks. Mostly YouTube behaves -- and why not - user generated content appears to be what's driving it right now.

Also the difference between YouTube's behavior and Grokster's is staggering. While the supreme court's language IS broad; the precedant is not THAT broad. Mike

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From: Jason Hirschhorn [mailto:jasonh@triplehmedia.com]
Sent: Monday, July 17, 2006 7:48 PM
To: Fricklas, Michael; Matthews, Beth; Lehman, Nicholas
Subject: FW: YouTube and the copyright cops: safe... for now?

http://arstechnica.com/news.ars/post/20060716-7273.html

YouTube and the copyright cops: safe... for now?

7/16/2006 7:39:28 PM, by Ken Fisher

If you've never heard of YouTube, let me introduce you: YouTube is a massively popular video sharing site that has quickly become one of the Internet's most trafficked websites, climbing into the top 50 of all sites online in a year's time (as tracked by Alexa). According to Nielsen NetRatings, the site serves almost 13 million users a month and serves up 50 million videos each day. Maybe you've been by the site to see Jon Stewart's hilarious (yet depressingly accurate) coverage of the "'Net neutrality" debate, or maybe you enjoyed watching Ernesto Hoost and friends in Silent Library. And maybe, just maybe, you've enjoyed some videos that weren't uploaded without the copyright owner's permission, too.

See, YouTube's continued survival is a bit of a mystery to some. The site thrives in part on what appears to be copyright infringement, but aside from a few scuffles (most notably with NBC), there's been nothing Napster-ish about its history. TV clips, movie clips, you name it... they all appear on the site regularly, and without authorization. So far, the major lawsuits haven't shown up.

Daniel Pearl, Deputy editor of BBC's Newsnight, recently compared life at the venerable Beeb to life at YouTube. Noting that the BBC has to get clearance for everything that it uses, Pearl asks, "So why is there one rule for us and another for YouTube?" That is, why does the BBC get hit with letters, licensing demands, and potential lawsuits when they use unauthorized material, yet YouTube is packed to the gills with it? "Perhaps someone could explain," he says.

For Pearl and others with similar questions, you're in luck. See, while the BBC and other news organizations are accountable for what they show to users, YouTube is built upon laws that give them a safe harbor. And believe it or not, it's the DMCA protecting YouTube—the same DMCA that is destroying fair use. As the EFF's Fred von Lohmann explains in an editorial for The Hollywood Reporter Esq., YouTube is shielded because the site is an "online service

provider," arguably similar to your own Internet Service Provider (ISP). Among other things, the DMCA provides protection for service providers against being held responsible for the actions of their users. Much like the RIAA can't sue Comcast for little Jimmy's pirate web server he hosts on their broadband network, so too with YouTube.

As an online service provider, YouTube seemingly has an out of almost any trouble you can throw at it. A disgruntled copyright owner must first supply the company with a legal notice of the infringement (the infamous takedown notice), and YouTube can stay in the clear by merely identifying the infringing material and removing it. They're safe from damages, even if 20,000 people watched the unauthorized material. Why? Because they only host it. Users upload the video (never mind how they got it), and that's ultimately the big distinction between YouTube and, say, the BBC. If the Beeb showed a 10 minute clip without authorization, they could be liable for thousands of dollars. YouTube, no.

As von Lohmann points out, this isn't a license to print money. YouTube can lose its safe harbor protections if it appears that they are directly profiting from the infringement of copyrights by their users. In von Lohmann's opinion, this is why YouTube only shows advertisements on pages without video on them. As the company searches for a business model, it will be critically important for them to stay away from anything that looks to capitalize on, well, one of the things that makes the site so popular: copyright infringement.

The situation leaves a bad taste in the mouths of many. Weblogs Inc. CEO Jason Calacanis wrote about the company's business model last February: "YouTube and other video hosting sites have made it easy to pirate stuff on the web (which is where piracy started), but they shouldn't be positioned as some revolutionary business," he wrote.

Perhaps it will be revolutionary, however. When the significant legal challenges come, and I strongly believe that they will, YouTube will be put into the onerous position of testing the limits of copyright law. Are clips of longer video programs fair use? Does a company that attracts so much copyrighted material have a chance to fight off charges of inducing or aiding copyright infringement? Does YouTube have a responsibility to make it impossible to download videos from their site? These are but a few of the questions looming large in the background.

While not exactly the same thing, it is important to note that the legitimate uses of P2P did not, in the end, protect Grokster. Rather, the ruling in Metro-Goldwyn-Mayer Studios v. Grokster left open the very real possibility that a disgruntled copyright holder could argue that YouTube, as a kind of Internet software, is "designed and promoted to aid in infringement" (to borrow language from the ruling). You may recall the the Supreme Court Justices pinged Grokster for failing to "develop filtering tools or other mechanisms to diminish the infringing activity using their software." And to get back to von Lohmann's argument about the cautious placement of advertisements, note that the justices also addressed this matter from a broad perspective, writing:

"[R]espondents make money by selling advertising space, then by directing ads to the screens of computers employing their software. The more their software is used, the more ads are sent out and the greater the advertising revenue. Since the extent of the software's use determines the gain to the distributors, the commercial sense of their enterprise turns on high-volume use, which the record shows is infringing. This evidence alone would not justify an inference of unlawful intent, but its import is clear in the entire record's context."

That is to say, merely refraining from placing advertisements on pages with infringing video won't necessarily be enough if the high-volume traffic of the site leads to advertising gains elsewhere. Sadly, the Grokster ruling did not bring the clarity to these issues for which many had hoped.

Two things are clear, however. YouTube is popular, and few people want to see the site go away. Since YouTube does not allow for users to download videos (without hacks that they do not support), many people feel that it is ultimately a win-win situation for copyright holders and the audience (the former essentially getting free promotion to the latter). The second matter is that legal eyes are watching YouTube. Following on the heels of their spat with NBC, the company instituted limits on video cap lengths largely to combat copyright infringement, and it may be no coincidence that they publicly revealed their motivations (consider the "filter" arguments noted above). The RIAA is now also after YouTube (and Google) for amateur music videos uploaded by users. Whether or not little spats will erupt into the all-out war that followed the pre-legit days of Napster remains to be seen, but I don't expect that old dog (the entertainment industry) to have learned any new tricks.

[Discuss

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jason hirschhorn